NO. 80-608

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ALEXANDER L. S
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Supreme Court of the United States

OCTOBER TERM 1980

UNITED STATES POSTAL SERVICE,

Defendant-Appellant,

vs.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS,

and

SAW MILL VALLEY CIVIL ASSOCIATION,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLEES

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QUESTION PRESENTED

May Congress, under criminal sanction of 18 U.S.C. Section 1725,* constitutionally deprive (a) non-commercial civic groups, (b) candidates for public office, or (c) municipal governments of access to traditional, community-sanctioned use of privately owned residential mail receptacles, effectively denying to the non-affluent citizen majority:

(1) the only meaningful, effective and practicable means to exercise First Amendment rights of free speech, and cognate rights of peaceable assembly and petition for redress of grievances, thus confining such rights to those with financial means sufficient to sustain the Postal Service de facto "stamp tax" levied on ideas, political expression and

*18 U.S.C. Section 1725 prohibits non-postpaid deposit of mailable matter, without apparent restriction on non-mailable matter.

association, and

(2) the only meaningful, effective and practicable means to enjoy the penumbral First Amendment right to receive the information essential to participate in and preserve the guaranteed Republican Form of Government?

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ON APPEAL FROM THE UNITED STATES
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SOUTHERN DISTRICT OF NEW YORK

BRIEF
for the
PLAINTIFF-APPELLEES

STATEMENT

The plaintiff civic organizations, appellees (sometimes referred to as respondents), instituted the action below seeking declaratory and injunctive relief against the appellant, United States Postal Service (defendant below), on the grounds that the provisions of 18 U.S.C. Section 1725 effectively interdicted the most basic rights guaranteed under the First Amendment.*

I. The Civic Associations.

Respondents are non-partisan, non-commercial citizen-civic organizations whose communications constitute a "very essential part" of the governmental and "political process"(J.A. 56)**. Their essential function is to galvanize

*The decisions below are contained in appellant's jurisdictional statement.

**J.A. references are to the Joint Appendix page number.

the citizenry into an awareness of its responsibilities to the orderly, efficient and honest operations of government.

Civic organizations encompass upper income areas (J.A. 31, 84), middle income areas (J.A. 31, 32), and lower income areas (J.A. 31, 32, 58), with citizens therein residing in all kinds of dwellings (J.A. 31), and representing in essence the entire cross section of America, from the most rural to the most urban (J.A. 31, 32, 34) and the most affluent to the most economically disadvantaged (J.A. 31, 32, 48).

Civic associations vary in size from 1,000 or more (J.A. 135) to substantially less than 200 (J.A. 35). Their financial structure is tenuous with annual dues ranging from $2.00 to $10.00 (J.A. 35, 61, 132) per family unit, in many cases voluntary dues remaining uncollected, particularly in low income areas. In most

cases a figure of approximately $150.00 or less constitutes the aggregate civic organization treasury balance (J.A. 35, 132), permitting at most one small mailing per year, totally insufficient to cover the wide ranging civic issues which blanket any community. Indeed, civic groups recognize the urgent necessity to distribute as frequently as monthly and certainly no less than quarterly (J.A. 82, 110, 132). Civic groups encompass not only those paying dues, but also the greater number of non dues-payers. (J.A. 40, 48, 86, 89, 115, 134).

II. Respondents' Non-Commercial First Amendment Distributions.

The respondents' distributions by means of volunteer civic mailbox deposit without postage are at the essence of grass roots democracy. The civic communications interdicted by the punitive statutory governmental action range from partisan

political campaign material (J.A. 47, 52, 136) to dissemination of civic news matter (J.A.63-64, 110), much of which may be euphemistically described as a call to civic arms.

Respondents' distributions do not comprise well financed, high-powered newspapers; rather, they consist of the type of plain pamphleteering which constitutes the sole resource available for the great mass of the American populace which must band together in civic groups to disprove the old adage that "you can't fight City Hall". If civic groups are denied the right to distribute in the manner sought to be suppressed by 18 U.S.C. Section 1725, the First Amendment may continue to exist on paper, but its use as a meaningful tool will be available only to the oligarchy of the economically and politically affluent.

The speech here sought to be metered by a postal toll gate embodies the most

vital concerns of a free people: how and by whom shall we be governed, indispensable to that Republican Form of Government embodied by the Founding Fathers in the Constitution. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

The respondents and others testifying below are involved in extensive lobbying for public interest legislation on behalf of their constituents (J.A. 134), in interacting with government fire protection (J.A. 107) and others in the areas of municipal services (J.A. 103), school services (J.A. 85) and patterns (J.A. 167), landlord-tenant abuses and corrective legislation (J.A. 168), public interest litigation on behalf of the citizenry, police protection, traffic problems, bicycle safety, land use zoning and planning, traffic and general environmental

protection of minority residential neighborhoods, the representation of low income tenants before unresponsive municipal housing authorities (J.A. 173, 174), opposition to governmentally supported referenda in derogation of the citizens' best interests, municipal budgeting, candidate forums, youth employment, planning, community beautification (T.P. 244-245)*, municipal charter revision (J.A. 134), and virtually every issue that conceivably impacts upon any community (J.A. 170).

The respondents, in addition to materials distributed on emergency bases (J.A. 37, 57, 63, 85, 90, 135), seek to inform the citizenry of community functions by means of humble newspapers distributed on such regular intervals as are permitted by the strictures of economics, available

*T.P. references are to pages of trial transcript.

citizen volunteers and the logistics of time (J.A. 110-111, 132).

Those civic newsletters are utilized to make contact with new residents in the community, to recruit future civic leaders and share the storehouse of accumulated knowledge of local governmental operations (J.A. 57).

It is these vital civic distributions which a Postal Service, insensitive to First Amendment rights and preoccupied with fiscal concerns, would seek to restrict in order to sustain a statute which the record demonstrates (a) has been subject to widely disparate degrees of enforcement and (b) serves no bona fide purpose in terms of the constitutional governmental authority to assure the orderly and secure delivery of the mails.

III. Absence of Alternatives.

This Court has given consideration to the crucial question of whether a party

alleging First Amendment constitutional infringements has available any meaningful and effective alternative to the prohibited method. The trial record shows clearly that practicable "alternate means" to avoid the burdens of the statute do not in actuality exist. Affixation of civic fliers or newsletters to "door knobs" or "door handles" has been shown to be totally unreliable in terms of the likelihood of delivery, due in no small part to the "vagaries of climate" alluded to by the Court of Appeals in this case at 586 F. 2d 935, 938 (2d. Cir. 1978) (J.A. 41, 59, 75, 111). Hanging civic distributions on door knobs while possibly of use in political campaigns of affluent candidates, are wholly impractical for civic use, both by reason of economics, logistics of time (J.A. 53, 54) and non-feasibility for use as an informative newsletter (J.A. 58, 59).

The Court of Appeals further alluded, in a footnote at 586 F. 2d 936 to "under

door delivery." Different structures and types of residences pose differing logistical problems. Private homes are now almost always, and even internal apartment doors are now often, equipped with storm doors or weather stripping which makes "under door delivery" physically impossible (J.A. 52, 42, 109).

At least three other alternate means of delivery of civic fliers have been considered, with various hybrid methods being suggested for different types of structures. The District Court suggested that scotch taping of civic fliers to doors might be a feasible alternative means of delivery (J.A. 165). Experienced civic distributors propounded cogent reasons why this was neither practical nor appropriate. Foremost is the basic question of unreliability of delivery, due largely to the vicissitudes of weather. (J.A. 43-44, 59). Scotch tape delivery has been found

not viable for other practical reasons as well.*

A civic flier flapping on the front door of a private residence, or even in an apartment house, is clear notice to the potential burglar of a vacant residence (J.A. 53). Almost any of the alternative possible physical methods of delivery -such as "door handles", placement on or under door mats, insertion in or behind storm doors -even if logistical inadequacies or impossibilities of deliverability could be overcome - pose the same threat to the neighborhood security, or as one civic-political activist stated: "It was a signal to every junkie in the neighborhood." (J.A. 53).

*It has been stated that use of scotch tape may tend to mar the home (J.A. 41), it imposes a substantial time burden when hundreds of civic fliers are being distributed (J.A. 59), and people tend to resent same as an imposition, as is also the case with other non-mailbox methods which people resent as being a cause of litter (J.A. 41, 42).

Delivery and placement of civic fliers by procedures alternative to non-postpaid mailbox deposit have other significant detriments: added cost, delay, physical impossibility, a serious burden to the environment and increased costs of municipal government by exacerbating the litter problem. (J.A. 103, 104, 227).

Attempting to place material on mats, behind storm doors, on handles, telephone communications, etc. engender still further problems. All have proven totally impracticable and ineffective, whether due to "vagaries of climate", inadvertent removal or other cited reasons. The trial testimony incontrovertibly demonstrates the total unreliability of delivery by any alternative method, a prejudicial situation which reflects the essence of respondents' First Amendment claims. The same Court which at first summarily dismissed the cause below determined these factual issues

at trial conclusively in favor of the respondents (490 F. Supp. 157).

The testimony of the Postal Service's experts confirms that the only "secure place" (J.A. 75), and "the safest place is a mailbox" (J.A. 131). The Postal Service survey confirms that there is an 11 percent greater reliability of deliverability for mailbox deposit, as opposed to alternate physical means (J.A. 165). As the District Court noted, ". . . half again as many proportionately, were not found where the notice was placed on the doorknob or under the mat," as opposed to placement in the mailbox (J.A. 153).

The methodology utilized by the Postal Service expert was inherently defective. First, the weather on the day of distribution of the survey material was "nice weather" (J.A. 154). Civic witnesses confirm that weather is a critical factor in terms of reliable delivery methods

alternative to mailbox deposit (J.A. 110). Had weather conditions been adverse on the survey day, the deliverability percentage of non-mailbox deposits would have been substantially decreased, and the reliability factor for mailbox deposit proportionately increased. The trial judge took judicial notice of the impact of the unpredictable vagaries of the weather upon this more hazardous alternative (T.P. 536).

Secondly, the survey permitted a call-back only on the evening of delivery (T.P. 505). Respondents established that the mailbox is clearly the most "secure place" and the "safest place" in terms of weather and perhaps mischievous children (J.A. 59); it is evident that items placed in a mailbox remain in a secure state and may be found within the next twenty-four hours, climactic conditions notwithstanding. This is not the case with respect to the alternative methods; again the

survey is biased against mailbox deposit.

The alternative methods of delivery suggested by the Postal Service are further dependent upon the ability to ascertain definitively the recognizable front door to a dwelling. However, in many areas there is no clearly recognizable customary entrance where the civic flier could be placed with any reasonable assurance that it would ever be received (J.A. 84, 162-16; T.P. 168). This significant variable negates all possible alternatives, the mail receptacle remaining the only site where reasonable reliability of delivery is assured. The survey utilized delivery at the apparent architectural front door of the dwelling, in an area where residents do not invariably use the front door as an entrance (T.P. 608, 609). The deficiencies in the survey are evident, yet it still demonstrates a much greater deliverability factor by the use of the mailbox.

The Postal Service has suggested that civic associations purchase a second mail receptacle near their regular mailbox, to be used as a depository for civic or political fliers. This type receptacle is certainly atypical (J.A. 401, 620); and civic experts have confirmed that it is impractical and uneconomical, both on private homes and on federally subsidized housing, where such additions would probably be unlawful (J.A. 47), as well as beyond the modest means of most civic treasuries.

IV. Long Standing Custom - The Citizens' Right to Receive.

As the District Court noted, 18 U.S.C. Section 1725 is honored more in the breach (T.P. 129), and is enforced more zealously in certain areas than others (J.A. 132), just as is so with the Postal Service's delivery standards (J.A. 147).

Respondents claim no intended discriminatory enforcement of the statute; yet it is evident that non-postpaid mail receptacle deposit is a custom of long standing, commonly accepted and expected by the citizenry, a prevalent practice for several decades". 586 F. 2d at 937, fn. 1. (J.A. 33, 74 107, 110). One resourceful New Jersey municipality has been utilizing this procedure "for so long that it just seems a way of life" (J.A. 127, 131).

The Postal Service's concern for handicapped citizens ("operation alert"), supports respondents' position. Permitting people to leave cash in lieu of postage has become an accepted practice recognized by the Service "to fill the needs of the community" (J.A. 149). While laudable, the program presents a situation no different from civic use of non-postpaid deposit to fill a need equally vital, the exercise of First Amendment rights to make government

more responsive to the will of the people. Neighborhood solicitation for recognized charities and concern for senior citizens, physically unable to receive civic notices in locations other than mail receptacles, further necessitates non-postpaid mail deposit (J.A. 75). Surely this presents a community need of equal status, albeit neither may be of First Amendment stature.

It was conclusively established that no citizen objections have ever been made to civic association non-postpaid mail receptacle deposit of non-commercial civic notices* (J.A. 32, 51, 62, 74, 107, 113, 135). It is equally evident that the great mass of the citizenry expects to receive civic, political and public interest oriented notices deposited without postage in their mail receptacles, that they act and

*The Press Release appended to the government's brief (1a) demonstrates that the only record of citizen complaints was in 1934 and related mainly to commercial matters.

depend upon same as a means of keeping informed on community matters (J.A. 74, T.P. 16), a conclusion based upon 140 years of cumulative civic personal experience (J.A. 51, 75, 107, 128).

It is not disputed that the citizen pays for and owns his own mailbox (J.A. 46). The Postal Service has recognized that people owning their own mailboxes frequently have an affirmative desire to receive non-postpaid materials at their homes.* Decades of accepted practice and community custom have rendered non-postpaid mailbox deposit of civic and political non-commercial materials essential to effective exercise of First Amendment rights. A flexible, meaningful Constitution must take

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*See Postmaster General Brown's March 4, 1932 Letter to Congress on proposed legislation, ultimately 18 U.S.C. Section 1725. The letter further noted "the questionable legality of such a measure." (Appendix to this brief, 1a) See also 586 F. 2d. at 937.

cognizance of the practical exigencies of contemporary society. The contrary view espoused by the Postal Service seeks to repudiate the realities of 20th Century society.

The Postal Service has recognized the mandates of a mechanized mail delivery and apparently decrees that "new homes" have their mail delivered by postal trucks at curbside "RFD" boxes (J.A. 111), The Postal Service has admitted that "curbline delivery," is being implemented "to avoid the postman having to get out and walk up to the front door of each house in order to save time and expense" (T.P. 476). The same rationale exists for civic representatives who deposit in homeowner mail receptacles (J.A. 83). Yet the Postal Service would claim such right for itself in the interests of time and expense, and deny same to the general citizenry which seeks

the same rights in the name of non-commercial free speech and free press.

The only citizen complaints ever received in response to civic or political distribution occurred when they were not deposited in mail receptacles, but rather when delivered by any of the so-called alternative methods suggested by the Postal Service, complaints engendered by litter problems (J.A. 51), notice to burglars of residents' absence (J.A. 52), or because of non-receipt (J.A. 51). Indeed, local police authorities have tacitly suggested the use of mailbox deposit in order to avoid an accumulation of material which may serve notice to potential felons (J.A. 52).

V. Bulk Mail or First Class Mail - Civic Impracticability.

First class mail rates are 18 cents per item and bulk mail (third class) is 10.4 cents per item. While civic groups may qualify, for the latter rate - notwith-

standing its clear impracticability of use as an effective means of communication (J.A. 61), both in terms of cost, undependability and logistics of time (J.A. 61, 75-76, 147) -there exists also a lower so-called non-profit rate of approximately 3.5 cents per piece.* Postal regulations expressly deny the availability of this rate to civic organizations (Postal Manual Section 134.53, "civic improvement organizations").** Bulk mail procedures mandate a minimum of 200 pieces per delivery, a $40.00 annual fee and an initial fee of $30.00. The only evidence on this issue reflects the Post Office denial of non-profit rate status to a local civic association (J.A. 133).

A certified public accountant, testifying for the respondent Saw Mill Valley

*Rates effective March 22, 1981, increased from 15¢, 8.4¢ and 2.7¢, respectively.
**The Court below concluded that the postal expert had testified that civic groups "may or may not be subject to . . . the non-profit rate" (T.P. 465).

Civic Association, a group engaged, inter alia, in legislative lobbying (J.A. 88), confirmed that the lower rate was not available, as the group could not qualify under Section 501 of the Internal Revenue Code of 1954 (J.A. 96). A civic association would have to qualify under Section 501(c)(4), a "civic league". An organization, such as the civic respondents, will not qualify if it is an "action organization" under Treasury Regulation Section 1.501(c)(4)-1.

The record is replete with testimony to the effect that the use of mail, whether first class at 18 cents, or bulk mail at 10.4 or 3.5 cents, is of no practicable use in terms of civic communications, due to its inherent logistical time problems* with respect to matters of vital community concern, continually arising on routinely

*"The Postal Service....handles third class mail on a deliver-it-when-we-get-around-to-it basis." Goodman and Dolan, Economics of Public Policy, p. 138 (West. 1979)

short notice* (J.A. 35-36, 63-64, 76, 114, 134-135). Municipal agendas are made available on such short weekend notice that any mail delivery, even first class, is far too time-consuming for civic efficacy (J.A. 23). The diverse civic issues reflect the urgent need to hand distribute (J.A. 171, 172, 173, 175). The use of bulk mail notices are often so tardy as to be received subsequent to the day of the meeting (J.A. 99).

Emergency meetings on vital community issues are so commonplace as to wholly destroy the practical utility of any mail procedures (e.g., J.A.114).* Even first class mail - mailed and received within one postal district - has been proven to be

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*Civic distributions are necessarily made by volunteers on weekends (J.A. 38). Cumbersome bulk mail procedures, coupled with weekend closing of post offices, render use of mails impossible for the typical urgent next week meeting (J.A. 60-61).

untimely (J.A. 85-86). The impact on optimum Postal Service delivery standards is materially affected by the priority to which third class mail is subject, in terms of its subordination to the completed handling of first class and "priority mail" (T.P. 429). "Different operating practices" are in effect at postal facilities throughout the nation (T.P. 429), rendering third class mail subject to the whim and caprice of divergent "customary operating procedures" of local postmasters.

While optimum standards require delivery of third class mail within a 48 hour period, it is evident that these are at best management standards and that delivery reliability "Nationwide varies dramatically, depending on the distance . . . and the transportation." (T.P. 364).

It has not been controverted that bulk mail procedures are impracticable as an effective means of communication because of its lack of feasibility in arousing the citizenry in sufficient time to alert them to issues and governmental meetings and because of the burdensome logistical problems inherent in its procedures (J.A. 60-61). Typically, between two-thirds and three-quarters of all civic groups are under 200 family units (J.A. 164), so that bulk mail is not even available for the majority of the civic community.

Finally, it has been confirmed that civic groups do not have even the limited funds to utilize the bulk mail procedures. (J.A. 36; T.P. 340-348). This is the case in lower socio-economic areas, and even in upper income areas (J.A. 84). Moreover, it is clearly not feasible to raise dues to meet mailing costs (J.A. 56; T.P. 348).

VI. The Alleged Statutory Purposes of 18 U.S.C. Section 1725.

The record confirms that any realistic burdens imposed upon the Postal Service, in the absence of the Section 1725 restrictions, are at the most marginal; certainly they do not rise to the stature of such pressing governmental needs as will justify the chilling First Amendment impact here imposed.

The facts demonstrate no substantial need for 18 U.S.C. Section 1725 in assuring secure delivery of the mails. The Postal Service argues that Section 1725 is essential to the Service's efforts to investigate internal theft, irrelevant in terms of citizens making a brief civic deposit (J.A. 70). That Section 1725 has been at best intermittently enforced obviates any force of this argument. This contention is based upon the police state mentality that "it creates suspicion if

anybody not in uniform goes up to the vicinity of a mailbox" (J.A. 71); yet the Service indicates that non-uniformed charitable solicitors or meter readers depositing in mailboxes do not create suspicion (J.A. 72).

Such a selective idiosyncratic application of the statute renders any positive purposes mere speculation. The invidious interpretation of the statute is documented by the Postal Service opinion that the approach of a non-uniformed individual to the area of the mailbox may be of a suspicious nature, but only in areas such as the South Bronx (J.A. 118-119) or with respect to a limited class of persons (J.A. 121).

The Postal Service has suggested that tubular receptacles in the vicinity of mailboxes may constitute a practicable alternative means of civic distribution. Why a non-uniformed person making a deposit therein, in the "vicinity of the mailbox,"

would not create suspicion, whereas depositing in the adjacent mailbox would do so, is unclear.

The Postal Service appears to argue that 18 U.S.C. Section 1725 is somehow necessary in order to enforce the Federal criminal law provisions relating to false representations through the mails, mail fraud, mail theft, pandering through the mails, etc., in that - absent 18 U.S.C. Section 1725 - "there is going to be a massive influx of thieves . . . posing as civic associations" (T.P. 273). However, none of these so-called fraudulent schemes have reference to non-commercial civic organizations. (J.A. 118).

The Postal Service's policy based on suspicions of non-uniformed individuals approaching the area of the homeowner's mailbox, is exemplified by one postal inspector

> People using the mailboxes for fraudulent criminal purposes ...frequently

> pose as a canvasser or solicitor and that's how they cover their other activities, their criminal activities.
>
> * * *
>
> The mail in the mailboxes would be more secure if people were precluded from approaching the vicinity of the mailbox.
>
> * * *
>
> By preventing anybody from using the mailbox in this fashion (in violation of 18 U.S.C. Section 1725), you will eliminate additional exposure to fraud and a possible haven for promoters to escape penalties of the mail fraud law (J.A. 119-120, 156; T.P. 578-580).

The foregoing reflects the view that to protect society against crime, actual and potential, government must eliminate all speech, the good and the bad alike. Only in this way can we eliminate the incipient criminal and create society devoid of criminality and immorality. Such an approach is anathema to every principle upon which our nation was established and the First Amendment ratified.

A postal inspector testified that 18

U.S.C. Section 1725 is helpful in preventing mail fraud. However, no civic groups have ever been involved in any of these investigations (T.P. 553,-555). Indeed, none of the Postal Service's examples of Section 1725 collections for non-postpaid matter deposited in mailboxes pertained to a civic organization. A national summary of alleged 18 U.S.C. Section 1725 violations for a 26 month period reflects NO RECORD OF ANY CIVIC VIOLATIONS (Respondents' Exhibit 48, J.A. 189-190).

In response to the Trial Court's inquiry as to the effect on postal surveillance if civic associations were permitted to deposit civic fliers, a postal inspector stated

> "It can only be a hindrance, I assume". (J.A. 161)

Respondents concede that the First Amendment -indeed the entire Bill of Rights - does present a hindrance to law enforce-

ment. It is obvious that a mere "hindrance" falls far short of such a governmental necessity or clear and present danger as to warrant the significant First Amendment restrictions here imposed.

VII. Civic Non-Interference With the Mails

There has indeed been wholesale violation of 18 U.S.C. Section 1725 by respondents, by political candidates, by municipal officials, and others, a customary practice over a period of many decades at least. The Postal Service has not submitted any facts - only hypotheses - that reflect any interference with or jeopardy to the security of the mails.

Civic witnesses verified (1) that they have never deposited civic material in an already filled receptacle or caused it to in any manner overflow (J.A. 39, 40, 55, 65, 128); and (2) that there has never been

any interference with any regular mail already in the receptacle.

The Postal Service has totally failed to demonstrate that the security or celerity of its regular mail has been impeded by civic actions in violation of 18 U.S.C. Section 1725. It has submitted only a factually inapposite time/motion study, relating to employee work standards, that asserts a detriment to mail delivery in terms of hypothetical dollars. Every constitutional provision designed to protect civil liberties imposes a burden upon government, the price for the privilege of being citizens in a Constitutional Republic. The Postal Service has tilted off center the balance wheel of the constitutional scales.

Conversely, the Service attempts to show that 18 U.S.C. Section 1725 generates revenue for the government. Even if arguably true, the constitutional response must be: The Bill of Rights cannot be

admeasured by matters of revenue. 18 U.S.C. Section 1725 is a criminal statute, not a revenue statute, and must be construed as such. It is evident that no significant collections have been made from civic associations (T.P. 576-78). The Postal Service's own records confirm that the program is not in fact cost productive. (J.A. 189-190). Moreover, constitutional freedoms cannot be weighed in the balance scale of the mercantile market, whatever the financial ledger may show.

Assuming that the civic associations were forced to cease their mailbox deposit, the Postal Service would nevertheless gain no additional revenue. It has been documented that civic groups cannot mail their notices; there would be no alternative except to cease distribution and thus no increase in postal revenue.

VIII. First Amendment Political-Municipal Expression

Municipalities have demonstrated both a logistical and financial need to distribute public interest notices in the same manner as respondents (J.A. 102-104, 107-108, 126-127). Municipalities have no practical alternative; for as with civic associations, so the municipality has a financial limit beyond which it may not responsibly escalate its tax levies, which have become increasingly subject to real and practical limitations (J.A. 103, 129).

Certain municipal distributions mandate mailbox deposit, no other procedure being possible (J.A. 103). The Hartsdale Fire District and the Borough of Millstone in New Jersey -a small but historic enclave -require mailbox deposit of critical citizen notices; and if denied the use of such a method, the distributions would, of necessity, cease (J.A. 235, 321). In respect to the Borough of Millstone, it would signal the end of a "way of life" for a people (J.A. 321-322) who, by their own

resources, a sense of independence and resourceful self-reliance, epitomize the values which have sustained our Republic.

What of the political process, so essential to a Republican Form of Government guaranteed by the Constitution? The political process is inherently interrelated with the civic process (J.A. 56). Political candidates are certainly within the scope of this litigation, as are municipal bodies such as fire districts (J.A.107).

Political deposit in derogation of 18 U.S.C. Section 1725 is a long established tradition, Political personnages have testified that such mailbox deposit is essential to political campaigns (J.A. 56). Politics would be for the rich alone if candidates, particularly independent-insurgents, were denied the right to deposit without postage in mail receptacles (J.A. 77). Campaign organizations for both our 38th and 39th presidents resorted to

this method of bringing their message before the electorate (Stipulation of Facts dated July 5, 1979, paragraphs 2 and 3, T.P. 181).

IX. The Chilling Impact of 18 U.S.C. Section 1725

Respondents have demonstrated that they have no practicable or effective alternative to non-postpaid deposit of "civic fliers" in homeowner mail receptacles. Civic and political activists have confirmed that the method of distribution in issue is "fundamental to the operation" (J.A. 137) of such effective non-commercial volunteer distribution, and there exists no practicable alternative (J.A. 33, 36, 39, 55, 57, 116).

Based upon cumulative civic experience of 140 years (T.P. 9, 77, 102, 147, 162-163, 182, 244, 332), it is clear that civic associations - if denied the right to non-postpaid hand deposit in homeowners' mail receptacles (1) could not

effectively serve their constituencies (J.A. 44-45); (2) could not effectively hold the meetings necessary to fight their community battles (J.A. 56); (3) could not effectively foster civic communication (J.A. 65, 76); and (4) could no longer be effective as viable community groups. The raison d'etre for their existence would vanish (J.A. 41).

The foregoing are expert opinions forged in the fires of practical civic experience. What actual results have ensued from the happenstantial efforts of the Postal Service to enforce 18 U.S.C. Section 1725? A White Plains New York civic group, under Postal Service threat (T.P. 338-339), has eliminated mailbox deposit, the net results being that (1) only dues paying members receive notices, i.e., approximately 150-200 out of a total of 1,000 and (2) drastically reduced meeting attendance (T.P. 343).

The respondent Council of Greenburgh Civic Associations, without funds for mailing (J.A. 78), was confronted in 1979 with a significant governmental reorganization referendum (J.A. 77), a referendum opposed in the face of influential support by the press (J.A. 78) and the Township, which expended public funds in support thereof (T.P. 158). Respondent - with a bank balance of $350 (J.A. 78) - expended $150 thereof (J.A. 80)* to deposit 10,000 fliers in homeowner mailboxes, in order to resoundingly defeat that proposal (J.A. 79). This is a typical example of successful grass roots plain pamphleteering in the face of powerful opposition, an effort doomed to failure had mailbox non-postpaid deposit been precluded. Citizens knowingly assumed the

*The trial transcript incorrectly stated the witness' answer as $150,000 (JA. 80). This was stipulated to between plaintiff and defendant below as being erroneous. (See appendix to this brief, 2a)

risks of 18 U.S.C. Section 1725, because of the import of the issue and the absence of any effective alternative. (J.A. 81).

Due to the June, 1976 threat of Section 1725 enforcement from the Postal Service (J.A. 24), Respondent Saw Mill was forced to suspend hand distribution to the bulk of its membership (J.A. 92), the prior procedure having been to mail to its minority of dues paying members and communicate with the greater majority of its members by hand delivered mailbox insertions (J.A. 92).

Saw Mill thereafter could hold no emergency meetings to consider numerous community issues. "As a result, the association is . . . almost dying" (J.A. 92-93).

Prior to June, 1976, 35 to 100 people customarily attended regular and special meetings of Saw Mill Valley (J.A. 93). In 1977-79, quarterly meetings had been eliminated as a result of in terrorem

elimination of hand delivered meeting notices (J.A. 92); and 15 to 17 persons attended the one regular annual meeting, less than a quorum (J.A.94).

For the period 1972-1976, the dues paying membership of Saw Mill Valley ranged from 107 to 130 (J.A. 89). No dues were collected after 1976, as a direct consequence of the Postal Service threat (J.A. 98-99, 100). The descending in terrorem spiral of civic activity caused by the Postal Service's enforcement threat has enfeebled the Saw Mill Valley organization, subjecting it to a vicious cycle of enforced censorship, causing a need to "revitalize our Association" (J.A. 101), a revitalization which cannot be effectuated without the traditional mailbox hand deposit system utilized so successfully prior to June, 1976. Were the Postal Service to be permitted to enforce 18 U.S.C. Section 1725, the result for civic groups throughout the nation would inevitably be

the same, except perhaps for a few enclaves affluent enough to defray the postal tariff. Citizens would then have but a theoretical right of free speech. Citizen frustration and apathy, which have fed disenchantment with the political and governmental process, would inevitably escalate. See letter from James Madison to W. T. Barry (Aug. 4, 1822). 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

SUMMARY OF ARGUMENT

The provisions of 18 U.S.C. Section 1725, as applied in the practical world of civic and political society, constitute a total interdiction of the citizen's ability to exercise rights of free press, free speech and assembly. Its chilling impact creates in essence a financial means test for First Amendment freedoms.

18 U.S.C. Section 1725 is, at most, a negligible weapon in the Postal Service's broad arsenal against mail related criminal

offenses. Respondents do not challenge the Postal Service's monopoly of mail delivery. Such groups, if denied their only effective and meaningful method of distribution, would be forced to cease distribution; no practical use could be made of regular mail procedures, and hence no material revenue considerations are here involved.

18 U.S.C. Section 1725 was enacted in the Depression era solely to preclude commercial entities from distributing in a manner competitive with the Post Office. It was not intended to prohibit customary methods of campaigning or to restrict distribution of non-commercial civic, public interest oriented material. The four corners of the statute, its history, and established principles of statutory construction permit no other conclusion.

The District Court sought to ascertain whether reasonable distribution alternatives existed. Contrary to the uncontroverted testimony, the Postal

Service argues that alternatives exist, but that civic groups "are reluctant to use these alternative channels." Respondents concede the availability of theoretical alternatives, but conclusively established at trial their impracticability. The "modest fee on ordinary postage" alluded to in the Postal Service brief - when multiplied a hundred-fold or more for civic groups, many in middle or low income areas - transforms a so-called "content neutral statute" into a total prohibition on the indispensable means of effective civic expression and the right of citizens to receive information on the operations of their government. The effect of such enforcement has been demonstrated as permitting only the affluent few to enjoy effective means of free speech, press and assembly.

Governmental and private functions daily intrude upon the privacy of citizens. Citizens seeking isolation from societal

pressures have means available to obtain such insulation, all without stilling the free flow of information. The so-called privacy interest of citizens is a postal distraction which does not here approach constitutional stature sufficient to justify the de facto oligopoly of the First Amendment brought about by the Postal Service's enforcement and application of 18 U.S.C. Section 1725.

ARGUMENT

POINT I

THE CONSTITUTIONAL POSTAL POWER IS SUBORDINATE TO THE BILL OF RIGHTS

The record conclusively demonstrates 18 U.S.C. Section 1725 presents an insurmountable burden to non-commercial civic, political and public interest oriented First Amendment communications. The Postal Service has submitted no countervailing evidence of constitutional stature. Any

category of regular mail has been demonstrated to be of little utility for civic expression, due to economics and logistical constraints.

The Postal Service, claiming that 18 U.S.C. Section 1725 aids its program of criminal law enforcement, argues that First Amendment communications should be curtailed because lawbreakers may attempt to pose as civic representatives. It may well be that the absence of 18 U.S.C. Section 1725 will hinder or inconvenience such efforts (J.A. 161). The constitutional right to counsel, against self-incrimination, and the ban on unreasonable search and seizure have imposed demonstrable material burdens upon the government, both financially and in terms of effective law enforcement; but these very burdens are indispensable elements of our constitutional framework. Surely the First Amendment rights of the average

citizen, through his civic and political groups, are entitled to equal stature.

This Court is here confronted with the dichotomy between the postal power granted Congress under Article I, Section 8, Clause 7, and the subsequent ratification of the First Amendment. However, evolving judicial history in the ensuing years confirms the paramount status of the First Amendment as indispensable to civilized society, and clearly elevates its significance beyond the simple power of Congress "To establish Post Offices and Post Roads". Mr. Justice Field in the watershed constitutional-postal power decision of Ex Parte Jackson, 96 U.S. 727, 732 (1877), held that postal regulations must be enforced "consistently with the rights reserved to the people, of far greater importance than the transportation of mail". Mr. Justice Brandeis, dissenting in Milwaukee Pub. Co. v. Burleson, 255 U.S.

407, 430-431 (1921), noted that the power of the post may be exercised only in a manner not infringing upon the Bill of Rights First Amendment protections. See also, Justice Holmes' dissent in Leach v. Carlile, 258 U.S. 138, 141 (1922). Particularly in the realm of criminal sanctions, as exists here, must the postal power inexorably give ground to the overriding public policy of the First Amendment. See Hiett v. United States, 415 F. 2d 664, 667, 668, 670 (5th Cir., 1969), cert. den. 397 U.S. 936 (1970). The United States Postal Service, in its frustrated and understandable zeal to promote economy and efficiency and escape from its horse and buggy image, has somehow lost sight of the fact that the citizenry has very definite First Amendment rights to which its operations must be subordinate. Esquire, Inc. v. Walker, 151 F. 2d 49 (D.C. Cir., 1945), affd. sub nom, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

The provisions of 18 U.S.C. Section 1725, through the regulatory vehicle of 39 C.F.R. Section 146.2, are applied to restrict non-commercial distributions of non-partisan civic groups seeking to further the public interest, against quasi-municipal bodies seeking to educate their constituents on public issues, and presumably against candidates for public office at the national, state and local level, all seeking to espouse certain causes or disseminate essential information to the community. As with 18 U.S.C. Section 1725, the regulation must be strictly construed and not extended beyond its clear terms. McCrossen v. United States, 339 F. 2d 810 (10th Cir., 1965).

While an act authorizing the imposition of criminal sanctions for alleged postal violations in the free speech-free press realm is to be strictly construed, conversely the mandate of

history and constitutional evolution requires that laws touching upon First Amendment rights must be narrowly drawn to pass constitutional muster. Schneider v. Smith, 390 U.S. 17, 24 (1968). While the criminal statute here might be narrowly drawn, as perhaps legitimately to restrict distribution of a specified class of commercial notices, the application thereof by the Postal Service transforms the legislative enactment into a broad limitation and prior restraint on the only practical means available to a broad segment of the citizenry in exercising their First Amendment rights. The comments of amicus National Association of Letter Carriers that there is only an "incidental infringement" of respondents' First Amendment rights or that of the Postal Service that there is but a "negligible" effect, is refuted by the record, as well as the reality of civic life.

The judicial branch is often required in the constitutional area to ascertain a balance between the legitimate ends of government on one hand and the interdependent need to protect and preserve the practical everyday mechanisms essential to the maintenance of our constitutional heritage on the other. The process becomes particularly delicate where a statute is judged not only in light of the First Amendment, but rises to the level of one specifically sanctioned under the Constitutional provision granting a specific postal power to the Congress. However, this balancing process must be implemented in light of the established principle that the postal power is inherently subordinate to the First Amendment. Societies may exist and even prosper without mandating a public monopoly over communications media, but none can be found in the annals of history in which free people long subsisted without

the effective, practical means to exercise the rights of freedom of speech, press and assembly. The Postal Service errs grievously in failing to recognize the priority which precedent, history, and experience mandate be afforded the First Amendment, as opposed to the limited governmental, proprietary interest in the area of postal regulation and marginal impact, if any, on the postal revenue.

While government arguably may impose some reasonable restriction on First Amendment expression, the balancing process requires a determination whether the governmental ends sought to be attained by the statutory enactment are of such significance and necessity as to justify any reasonable and limited First Amendment restriction, and whether such restraint is essential to avert any clear and present danger. United States v. Baranski, 484 F. 2d 556, 569 (7th Cir., 1973). A postal

deficit, here sought to be minutely diminished by suppressing respondents' civic speech, does not toll the death knell of freedom; its in terrorem impact on respondents clearly has already brought about such a result. The issues raised upon the present appeal do not relate merely to the survival of the respondents as viable citizen organizations; upon the decision to be rendered herein will rest the fate of civic organizations throughout the United States.

Whereas the First Amendment certainly requires no rationale here, the so-called Postal Power and the ends here sought to be achieved by the government's application of the subject statute does require analysis. The Postal Service argues that the ends sought to be achieved by the criminal sanction of 18 U.S.C. Section 1725 are (1) to protect and increase the postal revenue, (2) to prevent theft of mail and act as some

nebulous psychological benefit to its overall mail fraud detection program, and (3) to protect the individual resident citizen from having his mail receptacle excessively filled with non-postpaid material. The need to protect the postal revenue base is understandable. It is to be hoped that the need to operate government with some regard for financial considerations will never constitute a basis for overriding rights afforded by the First Amendment. While such revenue considerations may be afforded justifiable importance in commercial areas, governmental fiscal needs can not justify the practical emasculation of non-commercial First Amendment rights to all but the most affluent few who may be able to meet rapidly escalating postal rates.* The Postal Service's argument is patently

*See first footnote, p. 21

frivolous when the undisputed facts herein confirm that the respondents — and presumably all others similarly situated - would have but one alternative in the face of the continued Postal Service enforcement and present application of 18 U.S.C. Section 1725, namely to cease distribution. Thus, there would be no increase in the postal revenue, but solely the prior restraint of First Amendment rights, as the record confirms has already been inflicted on the Saw Mill Valley Civic Association (J.A.94, 98, 101).

As for the elimination of postal theft - a worthy objective - it is hard to conceive that a potential mail thief surreptitiously intruding into a residential mailbox receptacle would be measurably deterred by the knowledge that he faces a fine of $300 if he should happen to deposit non-postpaid mailable matter - as

opposed to non-mailable matter into the receptacle. Theft of mail is a felony punishable under 18 U.S.C. Section 1708, which refers to theft from any "letter box", presumably the same "letter box" encompassed by 18 U.S.C. Section 1725. 18 U.S.C. Section 1708, therefore, clearly fulfills the Congressional intendment in curtailing mail theft.

This Court, speaking through Mr. Justice Black, over thirty-six years ago, considered virtually the same arguments here made by the Postal Service; and in Martin v. Struthers, 319 U.S. 141, 143-147 (1943), repudiated a view which is tolerated only in a society which places more emphasis and value on the mentality of the police state than upon our constitutional heritage, firmly grounded in the Bill of Rights:

> ...burglars frequently pose as canvassers, either in order that they may have a pretense

to discover whether a house is empty and hence ripe for burglary... Crime prevention may thus be the purpose of regulatory ordinances.

* * *

While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. ..."Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." (emphasis supplied)

* * *

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society ... The dangers of distribution can so easily be controlled by traditional legal methods, ... that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas. 341 U.S. 144-147 (emphasis supplied)

The zealous law enforcers' pervasive suspicions so clearly condemned by this Court in Martin v. Struthers, supra, are precisely those which the Postal Service argued at trial as the rationale for the severity of its enforcement of 18 U.S.C. Section 1725 against civic free mailbox speech. (J.A. 118-121, 156-158). While security of the mail is an appropriate objective, under the facts here it does not constitute a permissible constitutional consideration, particularly since the Postal Service could produce no evidence of any civic involvement in crimes concerning the mails. In any event, the fact that there may be a potential mail thief in the great mass of the citizenry seeking to enter the marketplace of ideas does not warrant a general prior restraint on First Amendment rights. Fortunately, such a police state mentality does not constitute the touchstone of our society. This argument

was long ago repudiated by this Court; it should not now be revived.

The Postal Service's argument regarding the possibility of overstuffed mailboxes falls of its own weight. The record confirms that civic pamphleteering produces no such result. The Postal Service assumes that the great mass of "junk mail"* which inundates each residential mailbox is entitled to greater protection than the non-partisan civic or political distribution, solely because the commercial circular has paid the postal freight and the civic conscience can pay none. This rationale was effectively repudiated by the Court of Appeals at 586 F. 2d 938, i.e., questioning how the deposit of a postage-paid circular could be any less cluttering or endangering to a letterbox than an unstamped civic flier. It is to be hoped

*See Rowan v. Post Office Dept., 397 U.S. 728, at 736 (1970).

that the First Amendment cannot be said to rest upon such flimsy grounds. See, Thomas v. Collins, 323 U.S. 516, 510 (1945):

> ... These rights rest on firmer foundation . . . It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.

The First Amendment has been the subject of much history and jurisprudence and its standing is secure. The constitutional basis of the Postal Power is sparse indeed, which fact alone affords logical grounds to minimize its significance. Madison, in Federalist No. 42, opined:

> The power of establishing post-roads must, in every view, be a harmless power . . . (emphasis supplied)

Obviously a "harmless power" may not override or repeal the First Amendment.

Mr. Justice Holmes eloquently stated in dissent in Abrams v. United States, 250 U.S. 616, at p. 630-631 (1919):

> Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech."

Clearly the objectives here sought by the Postal Service do not approach such lofty levels. Tocqueville refers to "The post, that great instrument of intercourse". Tocqueville, Vol. I, Democracy in America, p. 404 (Alfred A. Knopf 1945). Steamboats, railroads and now airplanes have become great instruments of commercial intercourse, all without warranting any mass infringement on our basic constitutional rights. The Postal Service would seek to engraft upon Justice

Holmes' philosophy a special exception for its convenience, an exception which would place meaningful civic discourse beyond reach of most representative citizens. The First Amendment would be subject to the prior restraint of a financial means test; it would be rendered suitable, not for a democratic republic, but only for an oligarchy of the rich and politically powerful. Judge Learned Hand, commemorating fifty years of judicial service, stated:

> If we are to keep our democracy there must be one commandment: Thou shalt not ration justice. 264 F. 2d 35 (1959)

The Postal Service would do much more; it would meter out constitutional justice solely to the plutocratic few.

This Court has placed the Postal Service in proper perspective relative to our basic constitutional rights. Public

Clearing House v. Coyne, 194 U.S. 497, at p. 506 (1904):

> The postal service is by no means an indispensable adjunct to a civil government.
>
> * * *
>
> It is not . . . a necessary part of the civil government in the same sense in which the protection of life, liberty and property..... (emphasis added)

Respondents do not make distribution of newspapers in the modern commercial meaning of the term. However, the materials distributed fall within the purview of the free press protections. Lovell v. City of Griffin, 303 U.S. 444 (1938), Hughes, C. J., at p. 452:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a

vehicle of information and opinion.

Respondents exercise their First Amendment rights in homely style, unlike the prestigious daily newspapers or great publishing houses of our metropolitan cities. The First Amendment was intended by the Founding Fathers to be available to all, not merely to those who can bear great financial burdens and project their press product in an imposing cover.

The materials here sought to be distributed are admittedly non-commercial in nature. Whatever the constitutional justification for limitations on commercial distributions, it appears that charitable, civic, non-profit distributions or expressions of political persuasion are "an essential right that cannot be banned except for especially good reason," urgent governmental need or clear and present danger, none of which are here present.

Ad-Express, Inc. v. Kirvin, 516 F. 2d 195, 197-198 (2d Cir., 1975); Wolin v. Port of New York Authority, 392 F. 2d 83, 92 (2d Cir., 1968). The governmental need here espoused by appellant is of such relatively limited importance as wholly to fail to rise to the dignity of a statute which might justify even the slightest restriction on free speech or free press.

POINT II

THERE INHERES WITHIN THE FOUR CORNERS OF THE FIRST AMENDMENT A MEANS OF PRACTICAL IMPLEMENTATION

The respondents have proven that no other practical effective alternative to non-postpaid mailbox deposit exists; the Postal Service has sought to show that theoretical alternatives might conceivably be available. But the evidence does not in fact demonstrate the presence of any meaningful reasonable alternatives. One may not be deprived of the method which decades of diverse, practical, first-hand personal

knowledge of experienced civic organization representatives confirm to be the most efficacious method of exercising civic free speech. The Postal Service rationalization that such rights may be exercised elsewhere, or in a manner other than the procedure here sought by respondents, does not justify, nor avoid the subtle but real unconstitutional restrictions inherent in 18 U.S.C. Section 1725. Nor is the Postal Service qualified to judge or control when or where respondents may be permitted to raise their civic voices shielded by the First Amendment, under the guise of metering or muting their messages to inform and alert the citizenry. In Thornhill v. Alabama, 310 U.S. 88 (1940), Mr. Justice Murphy stated:

> ... one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place. 310 U.S., at 106

The perspective of the practical constitutional deficiencies created here by the Postal Service requires consideration of the purpose and scope of the civic or political activity here under scrutiny. It is axiomatic that citizens have a responsibility to inform themselves on the workings of their governmental machinery and to participate therein to the greatest extent possible. To this end there exists the essential prerequisite of the dissemination of information, without which such efforts would be futile. Tocqueville has commented at length upon the tendency of our citizens to combine in order to exert sufficient united power, so as to further their mutual interests and protect themselves against the incipient tyranny of a government which becomes isolated from the ideas of the populace and whose administrative torpor is exacerbated by lack of access to citizen ideas.

Tocqueville, Vol. II, Democracy in America, Chaps. V, VI, VII, ibid. See also, Brandeis, J. in Whitney v. California, 274 U.S. 357, 375 (1927):

> the greatest menace to freedom is an inert people; that public discussion is a political duty

In Bates v. City of Little Rock, 361 U.S. 516, 522-523 (1960), this Court held that the essence of the first freedoms "lie at the foundation of a government based upon the consent of an "informed citizenry" (emphasis supplied). Respondents seek but to foster the presence of such an "informed citizenry".

Article IV, Section 4 of the Constitution, guaranteeing a Republican Form of Government, has been construed as being political and not within the scope of judicial scrutiny. It must remain for the citizenry, by their own resources, to sustain this guaranty. Chief Justice Waite,

in United States v. Cruikshank, 92 U.S. 542, 552 (1875) inextricably interrelated the First Amendment freedoms with this concept:

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

For people to meet peaceably to petition within the law, to constitute an "informed citizenry," the method utilized by respondents, and virtually all civic and political groups throughout this republic, must be sustained. The right of peaceable assembly and to petition are cognate to those of free speech and press and are equally fundamental. DeJonge v. Oregon, 299 U.S. 353, 364 (1936), Hughes, C.J. It is not mere convenience of drafting that such rights were coupled in a single guaranty. Thomas v. Collins 323 U.S. 516, 530 (1945).

Respondents seek only viable methods of putting the First Amendment into actual practice. This Court in its decision making process, more than any other deliberative body, has recognized the reality of society. See Grayned v. City of Rockford, 408 U.S. 104, 118 (1971). Mr. Justice Holmes' celebrated comment regarding the competition of the marketplace for ideas has been characterized as being the "only practical test" The First Freedom, p. 456 (American Library Association 1960).

Mr. Justice Roberts stated in Schneider v. State, 308 U.S. 147, 161, 164 (1939), that the most effective way to disseminate opinion by pamphleteering is by "bringing them to the notice of individuals . . . at the homes of the people", a First Amendment method which may not be restricted in the name of public convenience or because there may often be present "fraudulent appeals in the name of charity and

religion," a view later articulated by Chief Justice Stone in his unpublished dissent in Martin v. Struthers, 319 U.S. 141 (1943)* and by Justice Black in his opinion for the Court. The Postal Service may seek the enactment of other laws, designed to obviate any real or imagined interference with the mails, with enforcement of the mail fraud statutes, or nominal interference, if any, with citizen privacy. Cf. Schneider v. State, ibid at p. 164.

The mass media are generally unavailable to the citizenry as a means of petition for redress of grievances - being relegated to the "poor man's newspaper", i.e. the type of civic fliers before this Court - so that effective access to a forum, namely a residential mail receptacle, assures that "some semblance of a market place of ideas can in practice be realized"

* Mason, The Supreme Court: from Taft to Burger, p. 155 (Louisiana State Univ. Press 3rd ed. 1979).

(emphasis supplied). Emerson, The System of Freedom of Expression, p. 286 (Random House 1970); Emerson, The Rights of Americans, p. 212 (Random House ed. Dorsen 1970).

Chief Justice Hughes emphasized the practicalities inherent in First Amendment exercise in Lovell v. Griffin, supra, 303 U.S. at p. 452:

> Liberty of circulating is as essential to that freedom as liberty of publishing, indeed, without the circulation, the publication would be of little value.

See also Lamont v. Postmaster, 381 U.S. 301, 305-306 (1965), where Mr. Justice Brennan, concurring, noted that the Bill of Rights encompasses also those guarantees "necessary to make the express guarantees fully meaningful," 381 U.S. at 308. The method adopted by civic groups for distribution of civic and political materials represents the only "meaningful" way in which to effectively utilize First

Amendment guarantees.

The record clearly reflects that respondents have no "ample alternative channels for communication", a criterion of obvious Constitutional import, Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93 (1977), where this Court noted the basic defect in an ordinance which restricted the free flow of information to the citizenry, a result similarly created by 18 U.S.C. Section 1725.

The Second Circuit, demonstrating the practical approach in balancing First Amendment claims in Wolin v. Port of New York Authority, 392 F. 2d 83 (2d Cir. 1968), did not relegate the exercise of "The First Freedom" to some impractible, useless, shackled fashion. Wolin sought to utilize the Port Authority interior - as respondents here seek access in time-honored community-sanctioned fashion to privately-owned mail receptacles -

> . . . because this is the most effective -and perhaps the only effective - way to achieve our purpose. (emphasis supplied) 392 F. 2d at p. 86.

The Court of Appeals struck down the Authority's regulatory ban, notwithstanding the possibility of disorderly public conduct, as to which no reasonable analogy of possible anti-societal impact exists with respect to the behaviour encompassed by 18 U.S.C. Section 1725. The anachronistic view that an "appropriate" facility should be restricted as a vehicle of free expression because it is "not traditionally a place for the exercise of First Amendment rights" (392 F. 2d at p. 89) - a view espoused by the Postal Service in regard to private mailbox receptacles - was rejected:

> . . . because they evidence too little regard for the vagaries of effective communication and for the versatility of the First Amendment's proscription. 392 F. 2d at p. 89.

Finally, the Court of Appeals repudiated the argument utilized by the Postal Service, that if any alternative means exist to exercise First Amendment rights, however inadequate, impractical or ineffectual they may be, then respondents must be bereft of any remedies, holding:

> Similarly, the availability of some alternative forum . . . are not material where the issue involves a blanket and wholesale ban. 392 F. 2d at pp. 91-92.

The First Amendment affords no protection if qualified by acts of Congress to the effect that the citizenry may exercise its rights of free speech, free press, or peaceably to assemble, only when, where and how the Postal Service directs. Certainly such was not the intendment of the Founding Fathers in adopting the First Amendment. The Constitution, in a clear recognition of contemporaneous English history, stated that "Congress shall make no

law . . ." It does not say that "Congress shall make no law except . . ." as may be necessary to operate an efficient or profitable postal system, or as will permit the exercise of the First Amendment Rights only in specific areas where Congress may sanction, or that a de facto financial means test may be a prerequisite to the effective exercise of such rights. The entire philosophical structure of the Postal Service's argument is at variance with our basic constitutional history.

As is clearly the inexorable, realistic and unrefuted impact occasioned by the appellant's enforcement of 18 U.S.C. Section 1725, the record confirms that the functional activities of civic or political bodies of a non-profit or non-commercial nature would be effectively stilled by the enforcement of the statute. The record confirms that the realities of community life, the apathy that regrettably pervades

our society, and numerous practical considerations fully support the result in the Court below. Respondents assert that such a postal tax inhibits the citizenry in the exercise of rights of free speech and free press, in the manner John Milton, in his Areopagitica, eloquently asserted that Parliament's ordinance of 1643 licensing the press served practically to emasculate a free press. It was obviously with this restrictive mother-country history so recently in mind that James Madison was motivated so purposefully in striving for the enactment of the First Amendment in the absolutist language in which it was first conceived and has so long endured.

Finally, the record irrefutably confirms that the Postal Service's threatened enforcement of 18 U.S.C. Section 1725 has in fact irrevocably impaired one respondent's ability to exercise its rights of free speech and free press. The Court is

urged to consider the practical realities in adjudicating the present constitutional challenge. This Court has noted that, in so doing, it may not "disregard the practical realities". Healy v. James, 408 U.S. 169, 183 (1972). It has long been evident that the flexibility and practical efficacy of the protections afforded by the Bill of Rights, and its ability to adapt to the realities and complexities of modern day society as a living and growing instrument, is based upon the recognition that our Constitution deals with substance rather than shadows, placing realities above theoretical philosophies.

POINT III

RIGHTS OF PEACEABLE ASSEMBLY, POLITICAL EXPRESSION AND FREE ASSOCIATION ARE INFRINGED BY 18 U.S.C. SECTION 1725

While the right of free association is not specifically covered by First Amendment

language, it is submitted that it is encompassed therein by clear implication and practical necessity. First Amendment guarantees necessarily carry with them by implication their practical means of utilization: Freedom to publish encompasses the right to receive, to read and to react by participating in the governance of a free republic. Similarly, the right to free association is a necessary corollary to the exercise of the explicit First Amendment right to "peaceably assemble, and petition the Government for a redress of grievances." Respondents submit that such right of association - essential to our society's liberties according to Tocqueville - is within the purview of the First Amendment; and that denied the right to distribute in the manner here at issue, the right is a mere illusion. See Eberhart v. Massell, 311 F. Supp. 654, at p. 658 (N.D. Ga.

1970):

> The freedom of association which the Supreme Court has recognized as protected by the First Amendment is a right to freedom of expression through associational affiliations.

The inevitable result of the Postal Service's enforcement of 18 U.S.C. Section 1725 would be the functional emasculation of the rights of free association and political expression. See also, Thomas v. Collins, 323 U.S. 516, 530 (1945):

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights. (emphasis supplied)

The First Amendment thus may certainly be construed as protecting the right of individuals to combine and for the association to engage in First Amendment advocacy on behalf of its members. Hanover

Township Federation of Teachers v. Hanover Community School Corp., 457 F. 2d 456, 459 (7th Cir., 1972).

The record reflects that candidates for public office are, as a practical matter, required to espouse their political beliefs in the same manner of delivery sought by respondents. Particularly is this the case with those who seek to unseat an incumbent vested with the very real economic benefits made available to public office holders. Nothing is more essential to a democratic society than to permit candidates for public office, whether rich or poor, to have available the means to run for office, which mandates practical access to resources essential for meaningful free speech. If deprived of the reasonable tools to run for public office, the right of free association and the effective expression of ideas is totally repudiated. See Mancuso v. Taft, 476 F. 2d 187, 196 (1st Cir., 1973).

The statute here under attack does not impose reasonable limitations; it absolutely denies, de facto, the effective right of free expression and association to all but the affluent few. "Wealth . . . is not germane to one's ability to participate intelligently in the electoral process". Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1965). This Court has clearly articulated our

> . . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1963).

This right is not reserved for those commanding the wealth or power of the New York Times; it must extend "to the poorly financed causes of little people" alluded to by Justice Black in Martin v. Struthers, supra, 319 U.S. at 146, i.e., the respondents here and all such civic or political groups or individuals. See

Chafee, Free Speech in the United States, p. 31 (Cambridge Press, 1941). Professor Chafee has put in very real terms the critical interdependence of free speech, assembly and political expression,

> Under modern conditions, freedom of speech under the First Amendment is likely to be ineffective if it means only the liberty of an isolated individual to talk about his ideas. Indeed, from the very beginning, freedom of speech has involved the liberty of a number of individuals to associate themselves for the advocacy of a common purpose whether they exchange ideas in a hall or by mail like the Committees of Correspondence before the Revolution. Chafee, The Blessings of Liberty, p. 150-151 (Phila. 1956)

It seems evident that the cognate right of assembly, and by implication association, are indispensable elements to effective expression in our pluralistic society, that such rights are essential to social stability and the functioning of our democratic society. See, Emerson, 72 Yale L.J. 877, 934, 954 (1963). The erudite

comments of Professor Archibald Cox at 94 Harv. L.R. 1, 3 (1980) regarding the dependency of effective self-government upon "the free flow of information" sought by respondents are particularly apposite here, citing this Court's opinions in Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964), and Cohen v. California, 403 U.S. 15, 24 (1971).

Tocqueville wrote in 1840: "In no country in the world has the principle of association been more successfully used or applied . . . than in America." ibid, p. 191. As we passed from the town meeting society of the 18th century to the industrialization of the 19th and to the megalopolis of the present century, this accelerating tendency has led the citizenry to seek common ways effectively to solve and participate in the political process.

History teaches us that one of the chief purposes of the First Amendment was to

foster open discourse on governmental functions. This necessarily encompasses debates on candidates, the manner in which government is or should be managed, and all matters incident to the political process. Mills v. Alabama, 384 U.S. 214, 218-219 (1966). In Kusper v. Pontikes, 414 U.S. 51, 56, 57 (1973), this Court enunciated the crucial role which group political association fulfills in our constitutional framework.

The obvious requirement of candidates' need for direct home personal contact and distribution of literature in the only effective way available - mailbox volunteer non-postpaid delivery - cannot be overstated. This Court further commented in American Party of Texas v. White, 415 U.S. 767, at p. 787 (1974):

> Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization.

Particularly is this the case for the local candidate, the independent insurgent seeking to unseat a vested incumbent political power, and the candidate with limited financial resources. Without access to such procedure, our political system may simply wither due to lack of access to new ideas or fresh persons flush with new enthusiasm for the never ending task of revitalizing government and maintaining the democratic system.

Secondly, the political process can survive only upon the continued free flow of information, a flow based upon the implied or cognate First Amendment right to receive, a constitutional right recognized by this Court in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969):

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.

This constitutional right to information appears to have formed the touchstone for this Court's decision in Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977), and the line of cases cited therein. See also Martin v. Struthers, supra, at 319 U.S. 146, and the concurrence of Mr. Justice Brennan in Lamont v. Postmaster, 381 U.S. 301, 308 (1965):

> It is true that the First Amendment contains no specific guarantee of access to publications. . . . the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers. (citations omitted).

In commenting upon the problems of fostering effective free expression, Professor Emeritus Thomas I. Emerson of Yale Law School stated:

> Search for the truth is handicapped because much of the argument is never heard or

> heard only weakly. Political decisions are distorted because the views of some citizens never reach other citizens, and feedback to the government is feeble. Emerson, The System of Freedom of Expression, pp. 628-629 (Random House 1970).

If the First Amendment does not mean at least this, it will ultimately be of little relevant practical value for most citizens. It must never be forgotten that "the greatest menace to freedom is an inert people". Whitney v. California, supra, 274 U.S. at p. 375. Such inertia will inevitably be nurtured by the appellant's argument, which idolatrizes conformity and governmental expedience at the cost of conscience and knowledge.

The majority of First Amendment cases coming before this Court in recent years presenting, as here, claims of broad statutory speechrestriction, i.e., overbreadth, turnupon the impact of "content-neutral" legislation. Indeed this Court's great First Amendment

pronouncements have rested upon its unique ability to pierce the "content-neutral" outer shell and analyze the real life impact of such restrictions on First Amendment freedoms. The Postal Service would have this Court repudiate such an approach, one which seeks to render the simple, eloquent mandate of the First Amendment meaningful, practical and real for the average citizen. See the dissent of Justice Black in Feldman v. United States, 322 U.S. 487, 501 (1944):

> The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential ... The proponents of the First Amendment, ... were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge. (emphasis supplied)

See also, United States v. Baranski, 484 F.

2d 556, 565 (7th Cir., 1973).

The Postal Service bases its entire argument upon the view that the statute is "content-neutral" and, therefore, infringes no Constitutional rights. It argues that it has but a "negligible effect on the exercise of First Amendment rights," and that the real life considerations and long established customs of the community, which effectively preclude alternative means, are but "trivial considerations". Finally, the Postal Service argues that a financial means test should be engrafted to the First Amendment, i.e., only citizens who can afford the tariff may utilize the residential mail receptacle. See Troyer v. Town of Babylon, 483 F. Supp, 1135 (E.D.N.Y 1980), affd. sub nom. Town of Southampton v. Troyer, 628F. 2d 1346 (2d Cir. 1980), affd. - U.S. - (Dock. No. 80-333, November 17, 1980), where Judge Weinstein stated at 483 F. Supp. 1139:

> Perhaps a group might by a comprehensive telephone campaign arrange for permission before visiting particular homes, but the financial and logistical burdens would inhibit newly organized or minor cults and creeds. Requiring consent of householders before approaching their homes constitutes, in effect, an indirect unconstitutional imposition of a licensing fee; it generates costs which burden the exercise of first amendment rights ... (citations omitted)

One need only examine the "content-neutral" prohibition of "For Sale" signs in Linmark Associated, Inc. v. Willingboro, supra, to perceive the superficial nature of the Service's argument. The uncontested record here confirms the de facto prohibition on effective speech, publication and ability peaceably to assemble. Saw Mill Valley died an in terrorem civic death due to its inability to communicate by reason of threatened enforcement of 18 U.S.C. Section 1725, which the Service summarily dismisses in

its brief as "a negligible effect" on First Amendment rights.

This Court's analysis in Linmark succinctly enunciates respondent's position and reflects that of the Postal Service.

> First, serious questions exist as to whether the ordinance "leave(s) open ample alternative channels for communication, . . ." Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated - primarily newspaper advertising and listing with real estate agents -involve more cost and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective media for communicating the message ... 431 U.S. 85, 93 (1977)

The Postal Service argues -in the face of the uncontroverted record below - that theoretical alternatives do exist. This respondents do not deny; if a group is politically powerful, economically

affluent, possessed of unlimited time without burdens of employment, demands of home, etc., there may well be alternatives for a favored few. This argument ignores the nature of society and the linchpin of the First Amendment. Rowan v. Post Office Dept., 397 U.S. 728, 735 (1970), where the Chief Justice noted that homeowners may take affirmative action to preclude distribution, a traditional law device which respondents believe protects both their First Amendment rights of distribution and rights of individual privacy.

Mr. Justice Sutherland's eloquent opinion in Grosjean v. American Press Co., 297 U.S. 233, 247 (1936), in recounting the English struggle to prevent the imposition of "taxes on knowledge," succinctly states the essence of that struggle, which is here in a modest but significant way being continued by the representative

respondents:

> The aim of the struggle was ...to establish and preserve the right of the ...people to full information in respect of the doings or misdoings of their government.

The respondents, by means of the civil and political combinations referred to by Tocqueville, here seek to utilize these great First Amendment protections ~~to~~ further free and open discussion of their community life and of governmental management or mis-management of the people's vital business. See Mills v. Alabama, 384 U.S. 214, 218, 219 (1966), where Mr. Justice Black stated:

> ...a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes ...humble leaflets and circulars.

The Postal Service argues that its statute is reasonable in objective and does not interfere with constitutional rights. It is submitted that the indisputable prior restraint here imposed, although subtle and not appearing in the four corners of the statute, is a very real practical inhibition. See P.A.M. News Corp. v. Butz, 514 F. 2d 272, 276-277 (D.C. Cir., 1975):

> Among the "evils to be prevented" by the first amendment press guarantee are ...any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

The principles in Griswold v. Connecticut, 381 U.S. 479 (1965), are an appropriate summary of the respondents' arguments. Justice Douglas noted that the First Amendment has a broad penumbra which sweeps within its ambit certain basic

rights not explicitly stated, and thereby precludes the state from inhibiting the right to distribute, from fettering freedom of association and of speech, or hampering a free press. The right "peaceably to assemble" is for respondents so inextricably bound up with free speech and free press that an infringement of one inherently infringes the other indivisible, inalienable cognate rights. The Court further noted that it has

> protected forms of "association" that are not political in the customary sense but pertain to the social, legal and economic benefit of its members. 381 U.S. 483

Respondents here seek no more, all for the benefit of the citizenry they represent in the civic and governmental sphere. Only by striking down the subject statute, and its regulatory companion,* can such rights be preserved, and effectively utilized.

*39 C.F.R. Section 146.2

"The life of the law has not been logic; it has been experience". Holmes, The Common Law, p. 1 (1881). The centennial of this great work is an appropriate time to recognize that Professor Holmes was there simply articulating for the profession that the law has grown in such a way as to enable it flexibly to adjust to the realities, and not be shackled by phrases which have no contemporary efficacy. The First Amendment has survived as a practical living force in our society by reason of its ability to evolve and confront changing conditions; not just immutably reflect the dry bones of language rooted forever in an 18th century context. Levy, Freedom of Speech and Press in Early American History, p. 309 (Harper & Row 1963 Torchbook ed.) Perhaps in times when town meetings were the order of the day, the needs here asserted by respondents would not have been so indispensable to the exercise of basic First Amendment rights.

The overwhelming monopoly of the mass media, the urbanization of our society, the depletion of environments conducive to effective political debates have all tended to diminish the influence of the individual and his ability to join with his neighbors in order to exercise an effective voice in the conduct of government.

Contrary to appellant's footnote implication at page 6 of its brief, the record here is uncontroverted that by practice and long established tradition people welcome and affirmatively rely upon such flow of civic information.* That the statute - enacted to encompass commercial distributions, - has stood as a civic nullity for forty-six years is no reason to raise it in stature above meaningful free speech considerations, on the "presumptively valid Act of Congress" theory embraced by the Postal Service to

*See Appendix 1a

dilute the First Amendment.

Respondents do not denigrate the appellant's well-intentioned motives in terms of mail delivery. The Postal Service may achieve its desired objectives by statutory restrictions which do not absolutely, as here, repress civic speech. Indeed other statutory devices are readily available, see Martin v. Struthers, at 319 U.S. 147, and Troyer v. Babylon, supra, 483 F. Supp. 1138. The Postal Service's position is essentially one of inconvenient hindrance (J.A. 161). Apparently, the Service believes the statute to be of more significance in low income urban areas (J.A. 119), certainly not a rational basis to sustain its constitutionality. The present appeal involves not a clash of wrongs, but rather relative priorities between significantly different constitutional rights. As cited in Point I, the postal power is inherently inferior to

the Bill of Rights' First Amendment protections.

However, in considering First Amendment issues, the judicial branch should not disregard the practical realities embodied in "the life of the law" as "experience", articulated by Mr. Justice Holmes a century ago. Respondents believe that the now widely accepted language of Justices Holmes and Brandeis in Whitney v. California, 274 U.S. 357, at 375, 377 (1927), articulates the evolving, flexible Constitutional jurisprudence upon which respondents base their rights at bar. The ministerial Postal Power has, therefore, but a very narrow scope for being sustained over First Amendment rights, to be weighed lightly, if at all, in terms of the balance scale of Constitutional jurisprudence. To come within this limited area, the governmental need sought to be achieved by the legislation must be one of

paramount urgency or emergency, or posing a clear and present danger to the Nation's survival, a state of affairs which is certainly not here present. Thomas v. Collins, 323 U.S. 516, 530 (1945). The argument, professing "valid governmental interests," cannot be deemed constitutionally sufficient to render the First Amendment a practical nullity for the average person without economic resources sufficient to purchase postal meter privileged protection for civic speech. The rationale of Mr. Justice Harlan in his concurring opinion in Talley v. California, 362 U.S. 60, 66-67 (1960), is particularly persuasive:

> Here the State says that this ordinance is aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity, and libel," in that it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will

> not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character.

Justice Harlan there noted the record's lack of any clear factual basis to support the government's argument of urgent necessity. The record here is similarly barren of any factual support to sustain 18 U.S.C. Section 1725.

A statute, as here, imposing criminal sanctions, with a clearly chilling, restrictive effect upon a broad spectrum of First Amendment rights, will be set aside on constitutional grounds as being void for vagueness unless (1) the conduct sought to be regulated is specifically and narrowly defined, and (2) the expression upon which it impacts is not within the explicit protection of the First Amendment, or its broad "penumbra". Hiett v. United States, 415 F. 2d 664 (5th Cir., 1969). The present

statute, as here applied, clearly fails these constitutional tests. The statute, albeit "content neutral" on its face, contravenes basic First Amendment rights. Murdock v. Pennyslvania, 319 U.S. 105, 115 (1943).

The present statute, all-encompassing in scope and not recognizing any reasonable permit procedures in order to allow essential First Amendment freedoms, must be held invalid on its face and in its entirety under the doctrine of "overbreadth". See United States v. Baranski, 484 F. 2d 556, 570 (7th Cir., 1973). "It is the broad sweep of the ordinance, and its chilling effect on a wide range of 'expressive or communicative conduct' which here reveals its facial invalidity". Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Respondents do not here contend that house-to-house mailbox deposit of civic material without postage is immune from all

legislative restriction. As suggested in Martin v. Struthers, 319 U.S. 141, 148, 151 (1943), Cantwell v. Connecticut, 310 U.S. 296, 306-307 (1940), and Schneider v. State, 308 U.S. 147, 165 (1939), reasonable limitations might be specified, and sanctions provided against disregard of house-holder notices forbidding deposits. See also, Rowan v. Post Office Dept., 397 U.S. 728, 736-737 (1970), and Troyer v. Town of Babylon, supra, 483 F. Supp. 1135, 1138-1139, affd. -- U.S. -- (Docket No. 80-333, November 17, 1980)

Moreover, the statute is admittedly penal in nature, notwithstanding the extra-legislative efforts of the Postal Service to convert it into a revenue regulation; hence any ambiguity should be resolved in favor of lenity, Rewis v. United States, 401 U.S. 808, 812 (1971). A penal statute shown to have material free press-speech restrictions is restricted by the rule that

a criminal statute is to be strictly construed, particularly when First Amendment rights are involved. Schwartz v. Romnes, 495 F. 2d 844, 849 (2d Cir., 1974); see also Ex Parte Endo, 323 U.S. 283, 300 (1944); and United States v. Wiltberger, 5 Wheat 76, 95 (1820), Marshall, C.J.

As citizen groups Respondents recognize the right of privacy, strangely here championed by the Postal Service.* The decision in Troyer v. Town of Babylon, supra, affirmed by this Court, succinctly presents the solution to this apparent conflict of values:

*The present case is not controlled by the captive audience doctrine of Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), which related to a management decision to preclude political advertising, as opposed to the present absolute statutory ban. In the instant case, homeowner recipients may read or discard the message as they see fit. Similarly the restrictions on rights of those incarcerated as in Jones v. North Carolina Prisoners Labor Unions, Inc., 433 U.S. 119 (1977), does not warrant such restriction on the citizenry in general.

> . . . extension of the freedoms of some often has a tendency to encroach upon those claimed by others. Nevertheless, the burdens placed on plaintiffs' free expression of ideas are not easily justified by balancing them against local interests in privacy and property.
>
> * * *
>
> ... in balancing societal and private interests in the free flow of ideas, the right of individual citizens to privacy and the ability of the state to exercise its police power, ... the individual desiring privacy must assume the burden of indicating the choice to be left alone.
>
> * * *
>
> ... the dangers of distribution may ... easily be controlled by traditional legal methods ... 483 F. Supp. 1137, 1138.

The Postal Service, in addition to asserting that civic groups might bear the burden of escalating postal rates or the astronomical costs of newspaper advertising, suggests the use of telephone communication. The record totally discredits this approach (J.A. 63), which method had proven to be "a disaster" (J.A.

343). See also Troyer v. Babylon, 483 F. Supp. at 1139. The Postal Service here relies on sheer labels -"content-neutral" - as a basis to constrict First Amendment rights on the basis of impracticable hypotheses. This Court has not permitted government to ". . . foreclose the exercise of constitutional rights by mere labels". NAACP v. Button, 371 U.S. 415, 429 (1963).

POINT IV

18 U.S.C. SECTION 1725 ENCOMPASSES ONLY COMMERCIAL DISTRIBUTIONS

The Postal Service relies upon the prior district court decision on the pleadings (448 F. Supp. 159) to argue that the statute was intended to encompass non-commercial distributions,*

The clear intent of Congress was to curtail the commercial practice by "Business Concerns ...of having

*reversed 586 F. 2d 935 (2d Cir. 1978)

their circulars, statements of account, etc., delivered by private messenger", 586 F. 2d at 938-939, fn. 5. The Postal Service relies for a contrary interpretation upon Congressional colloquy two years prior to enactment of 18 U.S.C. Section 1725. The legislative history confirms (a) Post Office doubt as to the legality of the legislation, (b) that people owned their own mailboxes and wished to receive non-postpaid matter, and (c) the legislation was directed exclusively at the contemporary practice of commercial utilities, which postal authorities feared would adversely affect mail revenues. (Appendix 1a). Utilities no longer employ this depression era hand deposit non-postpaid method (J.A. 33, 113; T.P. 346)

The explicit language of Section 1725 encompasses only commercial matter. Basic principles of statutory construction, noscitur a sociis and ejusdem generis

compel the same conclusion, Jarecki v. G. D. Searle Co., 367 U.S. 303, 307 (1961).

Prior unsuccessful attempts at legislation are clearly not the best guide to legislative intent, particularly absent proof that the prior legislative discussions were given any ultimate consideration. Zuber v. Allen, 396 U.S. 168, 193 (1969); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381-382, fn. 11 (1968). Moreover, legislative history should not be utilized to construe a statute contrary to its plain terms. See United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932).

The comments of Circuit Judge Friendly in Foti v. Immigration and Naturalization Service, 308 F. 2d 779, 786-787 (2d Cir. 1962) are particularly apt:

> ... a remark made in the course of debate, heard, in all probability, by only a few members of one house, two years before a bill's final passage,

should not overcome clear statutory language.

A statute must be construed in light of present society and not circumstances uncontemplated at the time of passage.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed and 18 U.S.C. Section 1725 be declared unconstitutional as to all non-profit, non-commercial communications, whether civic, political or of any public interest nature.

Respectfully submitted,

Jon H. Hammer
Attorney for Appellees

E. Payson Clark, Jr.
Of Counsel

April 1981

APPENDIX

Office of Postmaster General
Washington, D.C., March 4, 1932

Hon. James M. Mead,
Chairman, Committee on the Post Office
and Post Roads,
House of Representatives.

MY DEAR MR. CHAIRMAN: Receipt is acknowledged of your letter of February 15, 1932, requesting the department's views on bill H.R. 9262, to amend section 321, title 18 of the United States Code.

The purpose of this bill is to curb the practice of depositing statements of account, circulars, sale bills, etc., in letter boxes or other receptacles established for the receipt of delivery of mail without payment of postage thereon, by making this a criminal offense.

Much matter of this kind is of course now deposited in private mail boxes, thus depriving the Postal Service of considerable revenue which it would receive if the matter were sent through the mails.

While the department is in sympathy with the objects of the bill, since it would probably bring in additional revenue of more than $4,000,000 a year, it is necessary to call attention to the questionable legality of such a measure. The mail receptacles involved are private property and under the control of the owners, some of whom doubtless are willing to receive therein, without postage, matter of the character covered by the bill.

Very truly yours,

Walter F. Brown

(Letterhead)

August 20, 1979

Honorable Mary C. Daly
Assistant United States Attorney
United States Department of Justice
Southern District of New York
One St. Andrew's Place
New York, New York 10007

BY HAND

Re: Council of Greenburgh Civic Associations v. United States Postal Service
77 Civ. 483 (WCC)

Dear Ms. Daly:

As I advised you in some of our recent telephone conversations, it is apparent that there are numerous errors in the transcript of the trial proceedings of June 28, July 5 and July 6. Mr. Clark and I have reviewed the transcript in detail and there are errors which appear at pages 2, 3, 4, 6, 8, 11, 18, 20, 29, 32, 33, 45, 50, 55, 60, 61, 64, 91, 95, 98, 102, 103, 107, 148, 149, 152, 153, 154, 157, 158, 159, 162, 168, 169, 171, 173, 175, 183, 185, 188, 195, 196, 198, 202, 210, 213, 214, 217, 221, 226, 237, 278, 279, 285, 286, 305, 315, 317, 326, 337, 342, 345, 347, 356, 361, 372, 374, 377, 418, 429, 431, 440, 447, 478, 483, 484, 501, 523, 531, 537, 540, 546, 554, 557, 565, 575, 579, 580, 582, 586, 588, 589, 594, 595, 604, 617, 618, 619, 621, 623, 625, 630, 634 and 636.

I am delivering to you herewith a bound set of the corrected pages referred to above. I am also delivering a copy to the

court with the request that it be made a part of the record, as corrected, or that the corrected pages be inserted in the transcript.

Very truly yours,

Jon H. Hammer

JHH:mt
cc: Honorable William C. Conner
United States District Judge

E. Payson Clark, Jr., Esq.

(Letterhead)

September 14, 1979

Honorable Wiliam C. Conner
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Re: Council of Greenburgh
Civic Associations v.
United States Postal
Service
77 Civ. 483 WCC)

Dear Judge Conner:

I am herewith enclosing the original of the plaintiffs' post-trial memorandum of law. I have also included an appendix which contains certain items of statutory history, and, for the convenience of the Court, an index to plaintiffs' exhibits, submitted during the trial, and a copy of the stipulation of facts entered into by the parties during the course of the trial. For the convenience of the Court and the Court's law clerk, I am enclosing herewith an addtional copy of plaintiffs' post-trial memorandum of law. Further submitted herewith are all of the original exhibits submitted by the plaintiff and marked for identification and/or received in evidence, as itemized in appendix D to the post-trial memorandum of law.

With respect to the transcript of the trial proceedings, Assistant United States Attorney Daly has indicated to me by telephone that her preliminary review of the transcript confirmed that she was in

accord with plaintiffs' listing of errors which appear in the transcript, as detailed in my letter to Ms. Daly dated August 20, 1979, a copy of which was forwarded to the Court, together with a bound set of the corrected pages.

Respectfully,

Jon H. Hammer

JHH:mt
Encls.
BY HAND
cc: Honorable Mary C. Daly (BY HAND)